

STATE OF MICHIGAN
IN THE SUPREME COURT

In re Hon. J. Cedric Simpson,

Respondent

Sup Ct #150404

JTC Formal Complaint #96

AMICUS CURIAE BRIEF OF THE
NATIONAL CONFERENCE OF BLACK LAWYERS- MICHIGAN CHAPTER

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(Michigan Chapter)
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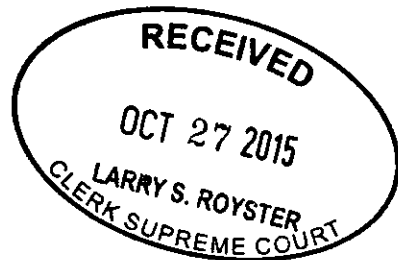


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INTRODUCTION

The Michigan Chapter of the National Conference of Black Lawyers (NCBL) appears as *amicus curiae* to challenge the propriety of the recommended sanction in this matter. In light of Judge Simpson's honorable record of service and his reputation in the community, the allegations, even if accepted as true, do not warrant dismissal from office. NCBL raises questions as well about the processes followed by the Judicial Tenure Commission, and whether they are susceptible to arbitrary practices that can contribute to the appearance of impropriety – specifically racial bias.

- I. JUDGE SIMPSON'S HONORABLE, DISTINGUISHED RECORD OF SERVICE ON THE BENCH AS WELL AS HIS REPUTATION FOR TRUTHFULNESS AND INTEGRITY MAKE THE RECOMMENDATION THAT HE BE REMOVED FROM HIS OFFICE WHOLLY INAPPROPRIATE.

By any standards governing the disposition of this matter, the Judicial Tenure Commission's recommendation that Judge Simpson be dismissed from office is wholly inappropriate.

The JTC analyzed this matter using the standards set forth in *In re Brown*, 461 Mich 1291 (2000).¹ An effort will not be made here to undertake a separate, detailed analysis of the *Brown* factors as they relate to Judge Simpson, but note will be taken of the fact that when considered as a whole, the factors reflect this Court's awareness of the fact that misconduct occurs at various

¹ The *Brown* standards are:

1. Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.
2. Misconduct on the bench is usually more serious than the same misconduct off the bench.
3. Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.
4. Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does.
5. Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.
6. Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.
7. Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

points along a continuum of severity. Ultimately, the *Brown* factors reflect an understanding not only of the fact that punishment should be proportionate to the offense, but also that the sanctions for a single misstep may be different from those penalties imposed for the latest in a series of improper acts. Perhaps the most severe penalty the JTC can recommend is permanent removal of a judge from his/her office. Thus, the question presented in this case is whether Judge Simpson deserves the harshest punishment.

Judge Simpson has no history of misconduct, and he must certainly be distinguished from those judges who have not only repeatedly found themselves under JTC scrutiny, but who also have been determined to be culpable and deserving of punishment on multiple occasions. If Judge Simpson receives the harshest punishment, then he will be undeservedly placed in the same category as repeat offenders. The *Brown* factor that considers a judge's history of misconduct appears first on the list. Regardless of whether this reflects the importance attached to it by this Court, for various reasons that factor deserves the most attention in evaluating the JTC's recommendation. Foremost among those reasons is that a judge's history can be a predictor of future conduct.

If Judge Simpson's record is any indication of what he might do in the future it shows a jurist who has organic, consistent, positive connections with the community he serves. He has worked extensively with the Peace Neighborhood Center in Ann Arbor, which, among many other things provides to low-income families a variety of youth programs and substance abuse services for adults. He has also worked with the Community Action Network and the Corner Health Center. His work has not gone unnoticed or unrecognized. He has received multiple

awards for his community involvement. Judge Simpson's service to the Bar has been equally committed and distinguished. He has held positions of leadership with the Washtenaw County Bar Association and the State Bar of Michigan.

Even more significant is the fact that his service on the bench has been respected, admired and acknowledged by his peers and by the citizens he has served. Although the JTC has insisted over vigorous denials that Judge Simpson lied during hearings, colleagues who know him well testified without reservation as to his honesty and integrity. These witnesses included: Judge Richard Conlin; an attorney with the Washtenaw County Public Defender's Office, and attorneys who have taught at Cooley Law School where Judge Simpson has also taught as an adjunct professor.

The significance of Judge Simpson's history is that even if one assumes *arguendo* that the allegations against him are true, there is nothing that suggests in any way that he is irredeemable, incorrigible, or in some way lacking the capacity to reform his conduct and resume otherwise exemplary service. Removing Judge Simpson from the bench would be a tragic waste of an individual who has been an invaluable asset to the court and to the community.

II. REMOVAL OF JUDGE SIMPSON FROM THE BENCH WILL CREATE AN APPEARANCE OF RACIAL BIAS

This matter concerns allegations of misconduct made against an African American District Court judge. That fact alone is sufficient to warrant special attention to the fairness of the

proceedings because of the well-documented history of disparate and discriminatory treatment received by African Americans in the legal system.² Because of this history a decision to impose the recommended penalty of removal of Judge Simpson from office will at the very least raise questions in the minds of many about whether the conduct of black and white judges in Washtenaw County is measured by different standards.

This Court voiced concerns about equivalency in *In re Brown*:

The most fundamental premise of the rule of law is that equivalent misconduct should be treated equivalently. Because the JTC has no written standards for categorizing and prioritizing its cases, this Court's ability to meaningfully review its recommendations is hindered. We are frequently left to consider the alleged misconduct in a legal vacuum, deciding whether a particular recommended sanction strikes us, by our own consciences, as commensurate with the wrongdoing.

Id. at 1292.

In *Brown*, this Court directed the JTC to establish standards that might facilitate fair and equivalent consideration of cases. Nevertheless, the JTC's recommendation in this case, if accepted by this Court, will result in starkly disparate discipline for Judge Simpson and Judge Kirk W. Tabbey, a fellow District Court judge in Washtenaw County who is white. Judge Tabbey received a public censure and a 90-day suspension because he "pleaded guilty to a reduced charge of operating a motor vehicle under the influence of alcohol..." *In re Tabbey*, 497 Mich 900 (2014). By contrast, Judge Simpson has no criminal convictions for any of the acts which are the subject of this matter. Yet he faces the prospect of permanent dismissal.

² *In the Matter of Color*, A. Leon Higginbotham, Oxford University Press (1978); *Criminalizing A Race*, Charshee McIntyre, Kayode Publications (1984); *Black Robes/White Justice*, Bruce Wright, Lyle Stuart, Inc. (1987); *The New Jim Crow*, Michelle Alexander, The New Press (2010).

In the same way that the JTC considered Judge Simpson's actions with concerns about the appearance of impropriety, there should be equal concern about the potential for the public to perceive – correctly or incorrectly – that racial bias played a role in the penalties for both judges. Most members of the public served by Washtenaw County's District Court are unlikely to probe deeply into JTC disciplinary records. They will know only that the white judge with a criminal conviction received a suspension of limited duration, and the black judge without a conviction was permanently removed.

NCBL readily acknowledges the possibility that the JTC recommended different penalties without conscious racial motives. There may be a variety of legitimate, non-racial reasons for the disparities. But NCBL believes it prudent not to automatically discount the role of race, even if there was no intent to make it a factor. In *Implicit Bias in the Courtroom*, Kang, et al., 59 UCLA L Rev 1124 (2012), the authors explain:

The conventional wisdom has been that these social cognitions – attitudes and stereotypes about social groups – are explicit, in the sense that they are both consciously accessible through introspection *and* endorsed as appropriate by the person who professes them. Indeed this understanding has shaped much of current anti-discrimination law. The conventional wisdom is also that the social cognitions that individuals hold are relatively stable, in the sense that they operate in the same way over time and across different situations. However, recent findings in the mind sciences, especially implicit social cognition (ISC), have undermined these conventional beliefs. As detailed below, attitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection. Accordingly, their impact on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.

Id. at 1129.

JTC staff are not prosecutors in the criminal justice system, but they perform a prosecutorial function. The authors explain that prosecutors are particularly susceptible to implicit bias.

...[T]he conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in just such environments. They exercise tremendous discretion to decide whether, against whom, and at what level of severity to charge a particular crime; they also influence the terms and likelihood of a plea bargain and the length of the prison sentence – all with little judicial oversight. Other psychological theories – such as confirmation bias, social judgeability theory, and shifting standards, which we discuss below – reinforce our hypothesis that prosecutorial decisionmaking indeed risks being influenced by implicit bias.

Id. at 1142.

Additionally, members of the JTC staff, like other prosecutors may, without thinking in explicitly racial terms, develop the practice of scrutinizing judges differently based on race. When this occurs with consistency, it can result in an unarticulated and subconscious race-specific standard.

These processes can lock in past inequalities, reproduce them, and indeed exacerbate them even without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong. In other words, structural bias can produce unfairness even though no single individual is being treated worse right now because of his or her membership in a particular social category.

Id. at 1133

Thus, a decision to discipline a particular judge may be consciously based on non-racial factors, but the attitude and approach may nevertheless be subtly and unconsciously influenced by the judge's racial identity. Consequently, this Court's role in preventing the imposition of inequivalent penalties recommended by the JTC becomes even more important. Furthermore,

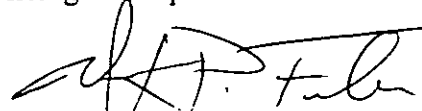
even if it is determined that a recommendation was not influenced by bias, either implicit or explicit, there must be a continuing concern about the potential for the *appearance* of unfairness and discrimination that can undermine public faith in the integrity of the process if penalties across racial lines are not equivalent.

CONCLUSION

Judge Simpson's history of service and integrity must receive the most careful consideration because they demonstrate why his removal from office is a wholly inappropriate penalty. Furthermore, his discipline occurs in a context in which, in the absence of careful attention to equivalency, the public is likely to conclude his punishment is the product of racial bias. Finally, there should be no ready presumption that bias has not played a role in proceedings against Judge Simpson, even if any such bias was unintended.

Respectfully Submitted,

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Dated: October 27, 2015

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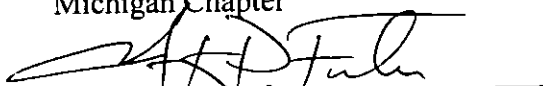
NOTICE OF HEARING

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Please take notice that the motion of the National Conference of Black Lawyers – Michigan Chapter for leave to file an amicus curiae brief will be heard on a Tuesday at least fourteen days after the motion is filed – that is, on November 10, 2015, or on a later date to be set by the Court.

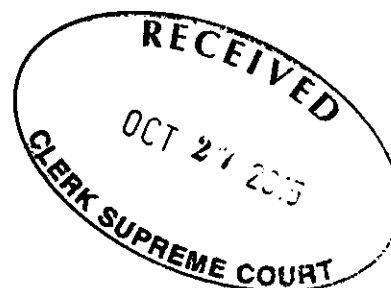
Respectfully Submitted,

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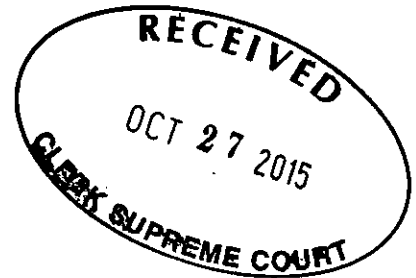
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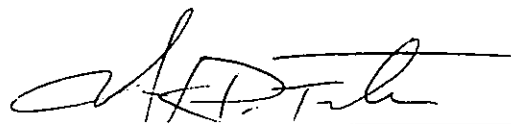
I hereby certify that on October 27, 2015, I served a copy of the motion of the National Conference of Black Lawyers – Michigan Chapter for leave to file an amicus curiae brief, two copies of said brief, and notice of hearing, on the following counsel by First Class mail, with postage prepaid, addressed as follows:

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